

# Exhibit 4

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF CALIFORNIA  
3

4 SHOSH YONAY, an individual, and )

5 YUVAL YONAY, an individual, )

6 Plaintiffs, )

) Case No.

7 vs.

) 2:22-CV-03846-PA-GJS  
)

8 PARAMOUNT PICTURES CORPORATION, a )

9 Delaware corporation, and )

10 DOES 1-10, )

11 Defendants. )  
12 \_\_\_\_\_ )

13 DEPOSITION OF JAMES McDONALD  
14 Los Angeles, California  
15 Tuesday, September 19, 2023  
16 VOLUME I  
17

18 CONFIDENTIAL  
19

20 Stenographically Reported by:

21 RENEE D. ZEPEZAUER, RPR, CRR

22 CSR No. 6275

23 JOB No. 6108374

24 PAGES 1 - 236  
25

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DOES 1-10, )  
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Defendants. )  
\_\_\_\_\_ )

Deposition of JAMES McDONALD,  
VOLUME I, taken on behalf of Plaintiffs,  
at 1999 Avenue of the Stars, Suite 800,  
Los Angeles, California, beginning at  
10:04 a.m. and ending at 5:59 p.m.,  
Tuesday, September 19, 2023, before  
RENEE D. ZEPEZAUER, Certified Shorthand  
Reporter No. 6275.

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1 A That's because every time I was in -- well, the  
2 one time I was in court, it was a federal court.

3 Q Do you know whether Disney submitted your  
4 expert report in connection with a motion for summary  
5 judgment?

6 MS. LENS: Objection. To the extent that it  
7 lacks foundation or calls for speculation.

8 THE WITNESS: Yes. They did submit it.

9 BY MR. TOBEROFF:

10 Q And the Court denied that summary judgment  
11 motion; correct?

12 MS. LENS: Objection. Same objection.

13 If you know, you can answer.

14 Objection. It's been asked and answered.  
15 Calls for speculation. Lacks foundation.

16 MR. TOBEROFF: Please stop coaching the  
17 witness. Of course he's going to answer if he knows.

18 THE WITNESS: I don't know why the judge ruled  
19 the way the judge ruled. I was not privy to any of  
20 that. It's not my area.

21 BY MR. TOBEROFF:

22 Q That's not my question.

23 Are you aware that the judge denied Disney's  
24 summary judgment motion?

25 MS. LENS: Objection. It's been asked and

1 answered. I think this is now the fourth or the fifth  
2 time. Objection. Asked and answered. Calls for  
3 speculation. Lacks foundation.

4 BY MR. TOBEROFF:

5 Q You can answer.

6 A I assume that the judge denied it because we  
7 went on into rebuttal arguments.

8 Q You were also retained by Disney in the Wilson  
9 case involving a trailer for the movie "Frozen"; is that  
10 right?

11 A Correct.

12 Q And your deposition was also taken in that  
13 case?

14 A Yes.

15 Q How many times was it taken?

16 A Once.

17 Q And to your knowledge was a transcript of that  
18 deposition prepared?

19 A I don't remember.

20 Q If a transcript was prepared, do you believe  
21 you would have it in your possession or access to the  
22 transcript?

23 MS. LENS: Objection to form. Calls for  
24 speculation. Lacks foundation. Incomplete  
25 hypothetical.

1 THE WITNESS: Repeat the question, please.

2 BY MR. TOBEROFF:

3 Q If a transcript was prepared, do you believe  
4 you would have a copy of it in your possession?

5 MS. LENS: Same objections.

6 THE WITNESS: I probably would. But I don't  
7 know for sure.

8 BY MR. TOBEROFF:

9 Q In that case you again concluded after  
10 filtering out the unprotectable elements of the  
11 plaintiff's work there was no substantial similarity  
12 between the plaintiff's worked and Disney's "Frozen"  
13 trailer; correct?

14 A Correct.

15 Q Are you aware that the Court in the Wilson case  
16 also ruled against Disney on its motion for summary  
17 judgment?

18 MS. LENS: Objection to the extent it lacks  
19 foundation or calls for speculation. Assumes facts not  
20 in evidence.

21 You can answer.

22 THE WITNESS: I don't know the specifics of  
23 what happened. The -- I wrote an expert witness report  
24 that was -- actually the judge had dismissed all of the  
25 elements except sequence of events in the case. And I

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1 district court's decision?

2 A Which decision?

3 Q Regarding summary -- any decision.

4 A The one that I read was when I got hired that  
5 he had -- the judge had limited the scope to sequence of  
6 events. That document I did read because otherwise I  
7 would have gone ahead and broken down -- done an  
8 extrinsic test on all the other things.

9 Q Did you read any decisions in that case after  
10 you submitted your -- had submitted your expert report?

11 A I don't think so.

12 Q Is it your general practice to read decisions  
13 in cases for which you submitted your expert report?

14 MS. LENS: Assumes facts not in evidence.  
15 You can answer.

16 THE WITNESS: Would you repeat the question?  
17 BY MR. TOBEROFF:

18 Q Actually I will rephrase that.

19 Is it your practice to read decisions in cases  
20 that are rendered after you submit -- had submitted your  
21 expert report in the case?

22 MS. LENS: Same objection.

23 THE WITNESS: It is not my practice to be  
24 reading, you know, after I have submitted my report  
25 unless I am continuing to work on the case for some



1 reason. But once my work is done, what happens after  
2 that I don't pay too much attention.

3 BY MR. TOBEROFF:

4 Q Have you ever offered your opinion in any other  
5 copyright infringement cases on the issue of substantial  
6 similarity?

7 MS. LENS: Objection to form.

8 THE WITNESS: Please repeat the question.

9 BY MR. TOBEROFF:

10 Q Have you ever offered your expert -- other than  
11 the Alfred and Wilson case, have you ever offered your  
12 expert opinion on substantial similarity in a copyright  
13 infringement case?

14 A Yes.

15 Q Can you describe to me those cases?

16 MS. LENS: Objection to form.

17 THE WITNESS: I can give you an example. There  
18 was a copyright infringement case on "Finding Nemo" back  
19 in the early 2000s. And I was hired to write an expert  
20 witness report. Since the case was in Europe, I wasn't  
21 deposed. I don't know what the deals were with the  
22 foreign courts or whatever it was, and I was hired  
23 directly by the general counsel at Disney for the case.  
24 I wrote an expert witness report and later heard from  
25 Andrew Stanton, by the way, that they won the case.

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1 THE WITNESS: Yes. There is certainly overlap.

2 BY MR. TOBEROFF:

3 Q Okay. In each of those cases you submitted an  
4 expert report?

5 A Yes.

6 Q And do you believe you still have copies of  
7 those expert reports?

8 MS. LENS: Objection to form.

9 THE WITNESS: I -- I believe I probably do  
10 still have them because I tend to be a pack rat with my  
11 notes and documents.

12 BY MR. TOBEROFF:

13 Q And in each of those copyright cases were you  
14 asked to do a substantial similarity comparison?

15 A Yes.

16 Q And in each of those cases did you filter out  
17 unprotectable elements?

18 A Yes.

19 Q And after filtering out what you believe were  
20 unprotectable elements, did you conclude there was no  
21 substantial similarity in each of those cases?

22 MS. LENS: Objection to form.

23 THE WITNESS: I believe I probably did, yes. I  
24 don't -- I can't give you specifics, but, yes, I believe  
25 the expert witness reports I found no substantial

1       similarities.

2       BY MR. TOBEROFF:

3           Q       Was your deposition taken in each of those  
4       cases to the best of your recollection?

5           MS. LENS:  Objection to form.

6           THE WITNESS:  No.  The Butzel Long case I was  
7       not deposed.  Actually in the "Sister Act" case I was  
8       not deposed.  I simply was asked to testify in court.

9       BY MR. TOBEROFF:

10          Q       Any other cases you believe you were deposed?

11          MS. LENS:  Objection to form.

12          THE WITNESS:  I was deposed on the "Pirates"  
13       case.  I was deposed on the "Frozen" trailer case.  And  
14       other than the cross-examinations I got in the  
15       arbitrations, those are the only times I have actually  
16       testified, that plus the "Sister Act" case.

17       BY MR. TOBEROFF:

18          Q       When you list in your CV serving as an expert  
19       witness in a copyright case, you're not referring to  
20       arbitrations, are you?

21          MS. LENS:  Objection to form.

22          THE WITNESS:  Yes.  Actually, I include that in  
23       as an expert because the idea is substantial  
24       similarities, and it runs the same thing as an extrinsic  
25       test.

1 preparing the report?

2 A Other than some basic formatting and framework.  
3 This was a little unusual for me in the sense that I had  
4 to do both the extrinsic report and the rebuttal report  
5 at the same time and combine them.

6 In the past I've always -- I have done either  
7 the expert witness report first and then come back and  
8 done rebuttal reports, but in this particular case, I  
9 had to combine them, so, yes, I got -- I discussed  
10 framework and formatting, things like that.

11 Q Why didn't you submit an initial report?

12 MS. LENS: Objection. Hold on. Calls for  
13 speculation. Lacks foundation.

14 If you know, you can answer.

15 THE WITNESS: I wasn't asked to. I was -- as I  
16 said in the beginning of my report, I was asked to be a  
17 rebuttal witness.

18 BY MR. TOBEROFF:

19 Q Did you use any support staff in drafting your  
20 report?

21 A No.

22 Q When I asked did you have any assistance from  
23 anyone preparing your report, you answered no; correct?

24 MS. LENS: His answer stands for itself. If  
25 you'd like his answer read back, Marc, you can have it

1       how I wanted to frame it or format it. And so I asked  
2       if that was the way they wanted it done. My format in  
3       particular -- because it's very similar -- I was using  
4       the format that I had used in the previous cases, in the  
5       previous case, and I wanted to make sure that my client  
6       wanted the same format.

7       BY MR. TOBEROFF:

8           Q       So when you were speaking of format, you're  
9       speaking of substance, you're not speaking about like  
10      computer, you know, typographical formatting; is that  
11      correct?

12           MS. LENS: Objection. That misstates his  
13      testimony. It's argumentative.

14           THE WITNESS: Actually it's -- I wanted to know  
15      if the format that I used was the correct format, **the**  
16      **format being that I would state what I felt and then get**  
17      **involved in what Mr. Bean claimed and then respond to**  
18      **those claims.**

19      BY MR. TOBEROFF:

20           Q       I understand. My question is: When I speak  
21      about a document not being properly formatted, I'm  
22      speaking about the margins or the typeface or the  
23      font -- or the font. You're not speaking about that  
24      type of formatting; correct?

25           MS. LENS: Objection to form.

1 references I was using.

2 Q Other than "Dambusters" and "Wings of Eagles,"  
3 do you recall any other films that you viewed in  
4 connection with your report that you decided not to  
5 include in your report?

6 A "Battle of Britain." "Midway." I may have  
7 used "Midway" in the report. I'm blanking at the moment  
8 on that.

9 Q Any others?

10 A Not that I recall at the moment.

11 Q And what is the -- what is the reason you  
12 didn't include "Dambusters"?

13 A If I remember correctly, it was because I  
14 didn't need it as a reference.

15 Q Why did you feel you didn't need it?

16 A I don't remember.

17 Q Why didn't you include "Wings of Eagles"?

18 MS. LENS: Objection. Asked and answered.

19 THE WITNESS: I didn't need it. I was already  
20 using "The Flying Fleet."

21 BY MR. TOBEROFF:

22 Q And "Battle of Britain," what is the specific  
23 reason you didn't include that?

24 A It wasn't needed to make a point or as a  
25 reference for a point. I don't remember -- you know, I

1 was going through quickly and getting -- looking at all  
2 aerial combat films. In fact, there was a list of 87 of  
3 them. And I picked and chose the ones that worked for  
4 and supported the points that I was trying to make.

5 Q Where was the list of 87 aerial combat films?

6 A It was on Wikipedia.

7 Q So of those 87 aerial combat films, how many  
8 did you watch before preparing your report?

9 A Well, the films that I've already told you I've  
10 watched. The other films I -- you know, I don't  
11 remember. The other films on the list I do not  
12 remember.

13 Q Did you -- of those 87 aerial combat films, did  
14 you research summaries of each of those films?

15 A No.

16 Q And with respect to "Dambusters" and "Battle of  
17 Britain," when I asked you why those were not included  
18 and you responded in effect because I felt they weren't  
19 needed, could you elaborate on that, what you mean by  
20 "weren't needed"?

21 MS. LENS: Objection. Asked and answered.

22 You can answer.

23 THE WITNESS: They were either -- whatever the  
24 elements in them were either redundant to what I was  
25 already using or they didn't apply.

1 (Recess.)

2 MR. TOBEROFF: We can go back on the record.

3 Q Can you just put that exhibit aside for now.

4 MS. LENS: What time did we go back on, Madam  
5 Court Reporter?

6 THE REPORTER: 1:18.

7 MS. LENS: Thank you.

8 BY MR. TOBEROFF:

9 Q Going back to page 2 of Exhibit 10 where it  
10 says, "My analysis in this report assumes the following  
11 principles guide the filtration analysis."

12 Did anyone provide you with these assumptions?

13 A Not recently. Years ago, yes, when I first  
14 started doing expert witness work, the attorneys  
15 schooled me in what the specific extrinsic test  
16 guidelines were.

17 Q When was that approximately?

18 A The specifics, I don't remember. I've been  
19 doing this for about 25 years to some degree.

20 Q Did you conduct your own legal research to  
21 arrive at these assumptions?

22 MS. LENS: Objection to form.

23 THE WITNESS: Have I gone back and looked at  
24 references to some of these? Yes. But mainly to find  
25 out definitions of them. Initially the attorneys that I



1 was working with way back when said this is what the  
2 legal definition of scenes a faire is and this is what  
3 the legal definition of merger is and how it's applied.

4 BY MR. TOBEROFF:

5 Q Could you go to the third bullet point in your  
6 report on page 2 and read to me -- read into the record  
7 the last sentence.

8 A You're talking about the bullet point that  
9 starts, "I understand that scenes a faire"?

10 Q Correct.

11 A You want the last sentence.

12 Q Correct.

13 A "For example, I understand that in a work whose  
14 basic idea is a dinosaur zoo, elements such as  
15 electrified fences, automated tours, dinosaur nurseries  
16 and uniformed workers have been deemed scenes a faire."

17 Q Now, in what you just read, is that from a  
18 particular legal decision? Does that give you the  
19 interpretation of a particular legal decision?

20 A I don't know what legal decision it is from.  
21 It was an example that was given to me by an attorney  
22 back when.

23 Q Okay. But you didn't read -- is it your  
24 understanding that that's an example from a specific  
25 legal decision?

1 A I don't know if it's an exact thing from a  
2 legal decision. But it wouldn't surprise me if it was.

3 Q Also, could you please go to the last sentence  
4 of the next bulleted paragraph which says, "I understand  
5 that the merger doctrine is similar ..."

6 Do you see that bulleted paragraph?

7 A Uh-huh.

8 Q Could you read that into the record, the last  
9 sentence, please.

10 A Last sentence, "For example, I understand that  
11 courts have held that a mood of secrecy and mystery  
12 merges with the idea of a show about the mystery of  
13 magic."

14 Q Is it your understanding that that last  
15 sentence refers to a particular legal decision also?

16 A I suspect it does.

17 Q Do you know what decision that is?

18 A No, I don't.

19 Q And you didn't read the legal decision  
20 corresponding to that?

21 A No, I didn't.

22 Q Also -- and if you go to the last bulleted  
23 paragraph on page 2, could you read that, the second  
24 sentence into the record in that bulleted paragraph?

25 A "For example, I understand that courts have

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1 concluded that, because the process of visualizing the  
2 sport of karate in a video game is constrained by the  
3 nature and rules of the sport itself the elements that  
4 flow from those constraints must be filtered out."

5 Q In that sentence what courts are you referring  
6 to?

7 A I'm not referring to any specific court. I was  
8 told that this was -- this was an example that was given  
9 to me in conversations with lawyers in the past.  
10 Probably because -- okay. Probably because the first  
11 time I actually had to put it down in an expert witness  
12 report, I needed examples of what they felt were scenes  
13 a faire or what they felt were merger, "they" being the  
14 attorneys that I was working for, and they gave me  
15 examples. We discussed -- I've discussed other examples  
16 with other people and, so, those were examples that were  
17 given to me and they said that the court -- courts had  
18 concluded in one of them. They referenced a case.  
19 Okay.

20 Q But your understanding was that these examples  
21 were for particular decisions; correct?

22 MS. LENS: Objection to form.

23 THE WITNESS: I suspect yes, they were from  
24 particular decisions.

25 //

1 Beyond the scope. Objection to form.

2 THE WITNESS: You're getting into areas that I  
3 am -- it's not -- I'm not a lawyer. It's not part of  
4 what I was asked to do or what I -- what I am an expert  
5 in.

6 BY MR. TOBEROFF:

7 Q Is it your opinion that there's no copyright in  
8 Yonay's story?

9 MS. LENS: Objection. Beyond the scope. Calls  
10 for a legal -- you can answer.

11 THE WITNESS: No. I believe there's a  
12 copyright there, yes.

13 BY MR. TOBEROFF:

14 Q And that copyright protects certain contents in  
15 the story; correct?

16 MS. LENS: Objection. Calls for a legal  
17 conclusion.

18 THE WITNESS: No.

19 MS. LENS: It's beyond the scope. Just give me  
20 a moment.

21 THE WITNESS: Sorry.

22 MS. LENS: That's okay.

23 THE WITNESS: It is my understanding -- again,  
24 I'm not a lawyer -- but it's my understanding that  
25 copyright -- his copyright protection in the article is

1 the way he expresses, the expression of the elements  
2 that he is reporting about, not necessarily the elements  
3 themselves, especially since this is a nonfiction work  
4 that is basically all facts and would be unprotectable  
5 under the extrinsic test. So his expression of those  
6 unprotectable elements and how he puts them together and  
7 how he tells them, those are protectable -- that's where  
8 his protection lies.

9 BY MR. TOBEROFF:

10 Q Did you consider what Yonay's expression in the  
11 story was protectable?

12 A Yes.

13 Q Can you identify for me that expression in the  
14 story that is protectable?

15 A The expression in the story that's protectable  
16 is the way that he puts together the unprotectable  
17 elements in it, the ones that he selected and the  
18 specific combination and the particular way he did it.

19 Q Is there anything else?

20 MS. LENS: Objection to form. Interpose an  
21 objection to the last question as well.

22 THE WITNESS: His -- you know, his literary  
23 expression, how he wrote it. But -- yeah.

24 BY MR. TOBEROFF:

25 Q So when would you say the copyright in the

1 story protects that?

2 MS. LENS: Objection. Calls for a legal  
3 conclusion. It's beyond the scope.

4 You can answer.

5 THE WITNESS: To the best of my knowledge, yes.  
6 His -- how he writes it as well as how it's expressed  
7 are the two things that fit into what would be  
8 copyrightable. Because this is a nonfiction work. All  
9 of these elements in his work are facts or real people,  
10 real things, real places, and those are all  
11 unprotectable under the extrinsic test.

12 BY MR. TOBEROFF:

13 Q What standard do you use in determining whether  
14 a certain combination of elements qualifies for -- in  
15 Yonay's story qualifies for copyright protection?

16 MS. LENS: Objection. Calls for a legal  
17 conclusion. Assumes facts not in evidence.

18 You can answer.

19 THE WITNESS: I don't really know what you mean  
20 by a "standard." Other than the fact that the specific  
21 particular combination of what he is and -- if there was  
22 another work that was substantially similar in the use  
23 of his particular specific combination, then, you know,  
24 there might be an infringement. But in this particular  
25 case, that's not true. He has a very specific

1 combination of elements and that combination, you know,  
2 is what I believe, I'm under the impression -- again,  
3 I'm not a lawyer -- but under the impression that that's  
4 what is protectable.

5 BY MR. TOBEROFF:

6 Q So in your report you speak sometimes about  
7 novelty. Is novelty required for the selection and  
8 arrangement of elements to be protected?

9 MS. LENS: Objection. Calls for a legal  
10 conclusion.

11 You can answer.

12 THE WITNESS: I'm under the impression that  
13 some creativity is needed, not necessarily originality,  
14 but some creativity. It can't be just a laundry list of  
15 elements. And that's creativity in the arrangement.

16 BY MR. TOBEROFF:

17 Q So some minimal level of creativity; is that  
18 correct?

19 MS. LENS: Same objection. Calls for a legal  
20 conclusion.

21 THE WITNESS: I don't know whether it's minimal  
22 or maximal or what. There's no scale. It's just that  
23 I've been led to believe under the impression that some  
24 creativity must be used.

25 //

1 I may be off on this, that it's a statement that he  
2 makes in describing the character that is being  
3 developed in these pilots.

4 Q I see. How about the following:

5 "Individualism against institutional authority."

6 Would you say that qualifies as a theme?

7 MS. LENS: Same objection. Objection to form.

8 THE WITNESS: On an abstract level, yes. That  
9 goes back to Ayn Rand.

10 BY MR. TOBEROFF:

11 Q And what do you mean when you say -- you keep  
12 repeating on an abstract level? Why are you saying on  
13 an "abstract level"?

14 A Because it's not -- it's not spelled out within  
15 a context of a story. It's a generic sort of statement.  
16 Individualism against authority, was it? I'm sorry.

17 Q Individualism against institutional authority.

18 A Institutional authority. Yeah. That's vague,  
19 general. Can apply to any story, any movie, any  
20 business.

21 Q It doesn't apply to everyone, every movie;  
22 correct?

23 A No.

24 Q So I'm just asking you without questioning  
25 whether or not it appears in a particular work, whether



1 that qualifies in general as a theme.

2 MS. LENS: Same objection. It's vague. Object  
3 to the extent that it calls for a legal conclusion.

4 BY MR. TOBEROFF:

5 Q Is that what you mean by in the abstract? You  
6 mean in general it qualifies as a theme, but you'd have  
7 to look at the particular work to see if that is a theme  
8 of that work? Is that what you mean by "in the  
9 abstract"?

10 MS. LENS: Objection to form.

11 THE WITNESS: It's a highly abstract very  
12 general theme that is basically just an idea until you  
13 see it in the context and how it's expressed within a  
14 story.

15 BY MR. TOBEROFF:

16 Q Isn't that true for everything in a story, it  
17 starts with an idea until it's expressed?

18 MS. LENS: Objection to form. It's  
19 argumentative. It's overly broad. It's vague.

20 THE WITNESS: Ideas are not protectable. The  
21 expression of ideas can be protectable.

22 BY MR. TOBEROFF:

23 Q That wasn't my question.

24 A I know. But you're just saying the idea --  
25 that -- yeah, ideas are just floating out there. Okay.

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